IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 255 OF 1999

1. Appasaheb Gopu Sawant
Age 56 years, Occ: Agriculture.

2. Shailendra Appasaheb Sawant
Age 27 years, Occ: Agriculture

3. Ashok Appasaheb Sawant.
Age 22 years, Occ: Agriculture

All residents of Karewade,
Taluka Jath, Dist : Sangli ...Appellants
(Orig.accused Nos.1 to 3)

V/s

The State of Maharashtra
(at the instance of Umdi
Police Station, Sangli) ...Respondent.

Shri Niranjan Shimpi, advocate appointed for the appellants.

Shri P.S. Hingorani, APP for the State.

CORAM: D.G. DESHPANDE &
V.M. KANADE, JJ.

DATE: 12th December, 2005

ORAL JUDGMENT: (Per V.M. Kanade, J.)

1. The appellants are the original accused Nos. 1, 2 and 3. They are challenging the judgment and order passed by the trial court whereby they were convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life. The accused No.1 was held guilty for the offence punishable under

section 323 of the Indian Penal Code.

2. The prosecution case, in brief, is that the accused No.1 and the deceased were real brothers and the accused Nos. 2 and 3 were nephews of the deceased. The prosecution case is that the ancestral property of the accused and the deceased was partitioned and that they were separated and they were cultivating the lands which had fallen to their share. There was still, however, a dispute regarding the path-way which passed through the property which was allegedly given to the family of the accused and the deceased used to travel on this path. One day before the incident, the deceased had gone to the village and returned home later and while crossing the disputed path-way, the deceased fell down on the thorny branches which were put across the path-way by the accused No.1. The prosecution case is that the deceased went to the respectable persons in the village and requested them to settle the dispute between the brothers. They assured him that they would visit his place on Monday 29th and settle the dispute between the two.

3. On 29/9/1997, the accused came home using the same path-way. Before that, in the morning, the accused

No.1 and the deceased had met in the village and there was a quarrel between the two and there was exchange of threats which were given by each of them. The prosecution case is that after returning home, the deceased handed over his shirt to his wife and, at that time, the accused No.1 came there and questioned him why he had travelled on the path-way. At that time, the deceased went towards accused No.1. The accused No.1 called his sons who came with the axes in their hands. The deceased started running away. The accused No.1 gave one blow with an axe on his right calf and second blow on his thigh. The deceased fell down and, thereafter, the accused Nos. 2 and 3 gave one blow each on the head of the deceased. The son of the deceased was coming towards the house. The accused No.1 instructed his sons to kill him also. However, the son of the deceased ran away in the sugar-cane field.

4. Initially, a telephonic message was given to the Police at the Umadi Police Station which is situated at about 45 kilometres by some of the villagers. Eknath, the brother-in-law of the deceased, accompanied the police to the scene of offence. The entire incident was seen by the wife of the deceased, by his daughter Kavita and by one more person who was

grazing his cattle in the field. The statements of witnesses were recorded. The accused were absconding. They were arrested from the nearby village after some time. All the three axes were recovered at the instance of accused No.2. The charge-sheet was filed. The accused pleaded not guilty to the said charge. The trial court convicted the accused for committing the said offence.

5. The learned Counsel appearing on behalf of the appellant submitted that the evidence of the wife of the deceased is full of contradictions and omissions. He has stated that her statement was registered as FIR after 4/5 hours and, in the meantime, the prosecution had an opportunity to fabricate the evidence. He has submitted that the daughter of the deceased was married and there was no reason for her to have been in the house at that time. Further, the prosecution has not examined Datta, the son of the deceased, who was an eye witness to the incident. He submitted that the deceased was a notorious criminal who was wanted in number of cases of rape and murder and there was every possibility that he might have been killed by his other enemies and that the accused had been falsely implicated. He submitted that the wife of the deceased would not have been an eye witness as she had

not touched the dead body and there were no blood stains on her clothes. Her evidence was, therefore, totally unreliable. Further, he submitted that there was major contradictions in her testimony.

6. The learned APP appearing on behalf of the State, on the other hand, submitted that the prosecution had examined three eye witnesses and there was no reason to disbelieve these three eye witnesses. He submitted that the evidence of the eye witnesses was natural and trustworthy. He submitted that, therefore, the accused was liable to be convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code.

7. In the present case, the prosecution has relied on the evidence of the wife of the deceased P.W. 8 - Gokula Kondiram Sawant. She has stated that 15 days before the incident, there was a quarrel between the accused and the deceased regarding the use of the path-way by the family of the deceased. She has narrated the incident which took place on the earlier night when her husband was injured due to the thorny fencing which was kept by the accused. She has further stated that on the next day, the respectable persons from the village had tried to intervene in the

matter. Further, she has stated that on the day of the incident, at about 11.00 a.m., she noticed her husband coming back from the same path-way. He came to the house, removed his shirt and handed it over to her. Thereafter, she has stated that the accused No.1 came there and questioned the deceased. P.W. 8, however, does not state that the accused No.1 was carrying an axe with him. The accused No.1 asked the deceased to come out. Accordingly the deceased went towards the accused No.1 and, thereafter, she has stated that the accused called his sons i.e. accused Nos. 2 and 3 who came with the axes in their hands and the accused No.1 gave a blow on the calf of the deceased and then on his thigh and, thereafter, the accused Nos. 2 and 3 gave a blow on the head of the deceased. She has further stated that she was also assaulted by the accused and she received certain injuries. She has further stated that the accused ran after her son Datta who ran away and her daughter Kavita closed the door and waited outside the house. She has stated that she narrated the incident to Eknath. Kavita - P.W. 10 has stated about the incident that she was standing in the courtyard with her mother and P.W.9 - Jivana Tambe was standing on the road, grazing his sheep. She has stated that the accused No.1, after the incident of altercation

between her father deceased Kondiram, started abusing her father and he had an axe with him. Thereafter, he called his sons and reiterated the same facts as stated by P.W.8. P.W.9 - Tambe also has narrated the said incident and has stated that he was standing at the distance of 100 feet from the place of the incident. It can be seen that there is a discrepancy in the evidence of P.W. 8 P.W. 9 and P.W. 10 to the extent that P.W. 8 in her statement does not state that the accused No.1 was having an axe initially when there was an altercation between the deceased and the accused No.1. P.W. 9 and P.W. 10, however, state that the accused No.1 was having an axe from the beginning. All the witnesses, however, have stated that the accused No.1 called his sons who gave a blow on the head of the deceased. It has been brought on record by the defence that there were number of cases pending against the deceased and he had been acquitted in some cases of rape and murder. From the background of the deceased, it appears that after the deceased came out of his house, after handing over his shirt to his wife, the accused No.1 started shouting for his sons, who came alongwith the axes. There is always a tendency amongst the witnesses to rope in all the members of the family particularly in cases where there is a family feud. In this case also,

admittedly, there was a dispute regarding the path-way between the two brothers and the deceased used to go by the path-way which, according to accused No.1, was given to him in partition. The evidence of P.W. 8, P.W.9 -Tambe and P.W. - 10 in respect of the assault by the accused No.1 to the deceased, therefore, appears to be an improvement. Eknath is a close relative of P.W.8. He came along with the police. The Investigating Officer has not recorded his statement as FIR and, admittedly, the police reached the scene of offence after a lapse of 4/5 hours. The accused were arrested after a considerable lapse of time from different village. The arrest panchanama was not prepared.

8. In view of all this, there is every possibility that the prosecution witnesses had enough time to improve their case. Datta, the son of the deceased, who was also an eye witness, has not been examined by the prosecution. In view of these glaring lacunae in the prosecution case, in our view, the benefit of doubt will have to be given to the accused No.1.

9. So far as the accused Nos. 2 and 3 are concerned, the three eye witnesses have given consistent story of the blows which were given by accused Nos. 2 and 3 on

the head of the deceased. The medical evidence also supports the eye witness account and the death has been caused as a result of the head injury which is caused by the axe. The submissions of the learned Counsel appearing on behalf of the appellants, so far as accused Nos. 2 and 3 are concerned, cannot be accepted. There is an overwhelming ocular and medical evidence on record which establishes beyond the reasonable doubt that the accused Nos. 2 and 3 had committed the murder of the deceased Kondiram.

10. In the result, the following order is passed:-

O R D E R

. In the result, the appeal is partly allowed. The appellant No.1 is acquitted of the offence punishable under sections 302, 323 read with section 34 of the Indian Penal Code and is directed to be released forthwith unless he is otherwise required in any other case.

. The appeal filed by the appellant Nos. 2 and 3 is dismissed. The judgment and order passed by the trial court is confirmed. The conviction and sentence

passed by the trial court is confirmed.

(D.G. DESHPANDE,J.)

(V.M. KANADE, J.)